

# Group Litigation Update

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## Executive Summary

### Context

Post Office is awaiting decisions from the courts on the Horizon Issues trial (which is now imminent), and on Post Office's application for permission to appeal the March 2019 Common Issues judgment (which should be delivered on or shortly after the oral hearing on the application on 12 November 2019).

The issue raised on 3 October 2019 concerning the disclosure of potentially relevant documents for the Horizon Issues trial (previous versions of Fujitsu's Horizon "Known Error Log"/"KEL" entries) has been resolved with the Court and the Claimants. It should not impact the trial or delivery of the trial judgment.

On 25 October 2019 we received the Claimants' individual Particulars of Claim ("IPOCs") for the third, Further Issues trial scheduled for March 2020. That trial will determine whether the types of loss claimed are recoverable in principle and, if so, how they should be quantified. Post Office's Defences replying to the IPOCs must be filed by 25 November 2019.

Mediation to explore settlement with the Claimant Group remains scheduled for 27-28 November 2019. On 29 October 2019 the Post Office Board authorised the Group Litigation Subcommittee to delegate to the General Counsel authority to make settlement offers at mediation, on terms determined by the Subcommittee. Advice on the financial range within which the General Counsel should be so authorised, and on the approach that could be taken to Claimants with criminal convictions, is being provided by Herbert Smith Freehills in separate briefing notes for the Subcommittee's consideration on 13 November 2019.

### Questions addressed in this report

1. What is the update on the Group Litigation (Horizon judgment; Common Issues trial; Further Issues trial)?
2. What approach is Post Office taking in its Defences to the Claimants' "Particulars of Claim" filed for the third, "Further Issues" trial?
3. What are the next steps in the Group Litigation?

### Conclusion

1. The Horizon judgment is now imminent, and should not be delayed by the "KEL Disclosure" issue. The Court's decision on whether to grant Post Office permission

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to appeal the Common Issues judgment should be delivered on or very shortly after the Court of Appeal hearing on 12 November 2019. The Claimants filed “Particulars of Claim” for the March 2020 “Further Issues” trial on 25 October 2019, which Post Office must reply to by 25 November 2019.

2. The Further Issues Defences are being drafted so as to accept in principle the Claimants’ uncontroversial claims for compensation, but to oppose the unorthodox or potentially significant claims for loss of earnings to retirement and litigation funding. The Defences will also minimise the scope for factual disputes which could lead the Judge to make adverse factual findings on incomplete, assumed facts.
3. The next key steps are attending to the Horizon judgment once received, attending the Court of Appeal hearing on 12 November 2019 and mediation on 27-28 November 2019, and filing by 25 November 2019 Post Office’s Defences to the Claimants’ claims in the Further Issues trial.

### Input Sought

The Subcommittee is asked to NOTE:

1. the updates in this paper;
2. the approach being taken in the Defences being drafted for the Further Issues Trial; and
3. the next steps to be taken in the litigation.

### Input Received

This paper has been prepared with the assistance of external legal counsel.

The Board is reminded to exercise caution when communicating about potential levels of settlement. Communications about settlement should therefore only be held orally, but if that is not possible, advice should be sought from Post Office’s lawyers.

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## Litigation Update

### *Horizon Judgment*

We have still not received the draft Judgment on the Horizon Issues trial, which is now imminent. On 6 November 2019 the Managing Judge emailed the parties advising that “intended dates for distribution of the draft will be circulated in due course”.

The Claimants may seek to postpone the mediation scheduled for 27-28 November 2019 if they do not feel they have sufficient time to consider the judgment ahead of the mediation. However they have not yet asked for this.

### *KEL Disclosure Issue*

In October 2019 we reported that an issue had come to light which suggested we may not have given proper disclosure of the Horizon “Known Error Logs” (KELs) for the Horizon trial.

This issue has now been resolved:

- the Claimants have informed us and the Court that they do not want to review any further KELs or make further submissions to the Court on this issue; and
- the audit we commissioned on the completeness of Fujitsu's KEL disclosure has not identified any further KELs which need to be disclosed to the Claimants or require Post Office to change the submissions we made about Horizon during the trial.<sup>1</sup>

The KEL issue should not therefore have any direct impact on the Horizon trial or delay delivery of the judgment.

### *Common Issues Appeal*

The oral hearing of Post Office's application for permission to appeal the Common Issues Judgment handed down in March 2019 will take place on Tuesday 12 November 2019. Helen Davies QC will be representing Post Office at that hearing.

We should receive the Court of Appeal's decision at the end of that hearing or very shortly after.

### *Third / Further Issues Trial*

On 25 October 2019 we received from the Claimants individual particulars of claim (IPOCs) for four test cases (Abdulla, Bates, Stubbs and Stockdale, each a “Lead Claimant” in the Common Issues trial).

The IPOCs set out the types of loss each Claimant is claiming for the purposes of the March 2020 Further Issues trial, which will determine whether those losses are recoverable in principle and, if so, how they should be quantified. The IPOCs have not put any values on these claims.

Post Office has until 25 November 2019 to file Defences to the IPOCs, with Helen Davies QC and Tony Robinson QC retained to lead this work. The approach which Leading Counsel is recommending is discussed in “Further Issues Trial – Defences” below.

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<sup>1</sup> The written report on the audit is due to be delivered during the week commencing 11 November 2019.

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*Future Trials*

As part of the ongoing review of all 555 individual cases, we are continuing to identify criteria for selecting “Test Claimants”, whose cases could be used as representative of the wider claimant group in a (unscheduled) future trial on breach (i.e. whether Post Office acted wrongly), causation (i.e. did that breach cause the Claimant’s harm), and limitation (i.e. is a Claimant’s claim time-barred).

No date has yet been set for the selection of test claimants. The parties have agreed to write to the Court proposing to exchange proposed selection criteria on 12 December 2019, which would enable the outcome of Post Office’s application for permission to appeal the Common Issues judgment to be factored into the selection criteria, and for a further CMC to be set for January 2020 in this respect.

## Further Issues Trial - Defences

*Approach to Facts*

The Further Issues trial is proceeding on the basis of assumed facts with no witness evidence being called. The Court will therefore assume that the claims made in the IPOCs are factually correct (e.g. that Post Office was in breach of contract), and that it will not need to make findings to resolve disputed issues of fact (e.g. as to whether a specific event happened or not).

The trial has been structured this way so that the Court can make findings now on the types and scale of losses that are recoverable in principle by the Claimants, without first needing to hear evidence on whether Post Office has acted unlawfully (which would significantly increase the trial’s preparation time, hearing time and cost). The question of whether Post Office has, in fact, acted in breach of contract will be addressed at a later trial.

Consistent with the approach being taken to assumed facts, the IPOCs acknowledge that nothing Post Office says in its Defences will be taken as an admission of any of the assumed facts or allegations of breach and causation contained in the IPOCs.

*Content of the IPOC*

The assumed facts underpinning the Claimants’ IPOCs build on those advanced in the Common Issues trial (some are similar and some are new e.g. the claim in relation to funding). For example:

- Post Office made them pay for shortfalls for which they were not liable;
- their retail businesses were disrupted by having to deal with shortfalls;
- their postmaster contracts were unlawfully suspended and terminated;
- their reputations were damaged as a result; and
- they could not afford to fund legal action against Post Office because of the financial harm they had suffered.

These assumed facts provide the foundation for the very wide range of loss and damage the Claimants are claiming, which include:

- recovery of wrongly repaid shortfalls;
- lost remuneration and profit (from the Post Office and independent retail business), during suspension and after termination;

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- loss of capital investment / diminution in branch value;
- the costs of the Claimants' litigation funding;
- reputational/stigma damage leading to disadvantage in the labour market;
- compensation for distress, anxiety and inconvenience;
- "aggravated damages" to punish conduct which is not just unlawful but reprehensible; and
- consequential losses, such as wasted staff time, staff redundancy costs, overdraft fees etc.

### *Post Office's Defences*

The legal principles behind many of the claims are not contentious, although the way which they claimants seek to apply them can be. The two claims we see as being most contentious are:

- post-termination losses, which on the Claimant's claim are worth c. £148m if payable up to the date of retirement (the Claimants' best case); and
- litigation funding costs, which on Herbert Smith Freehills' analysis could be worth c. £72m (as at May 2020, assuming a 4x multiplier is applied to their incurred legal costs).

Given that the Further Issues trial will proceed on the assumption that Post Office is in breach, Post Office does not need to dispute any of the factual claims put forward by the Claimants. Leading Counsel is therefore recommending that we only challenge the Claimants' case and put forward Post Office's own case where absolutely necessary to determine whether a loss is recoverable in principle.<sup>2</sup>

This approach will mean that for the most part, only the Claimants' view of events will be before the Court, not Post Office's. Post Office will however still be able to challenge this later in the litigation (when it can put its full evidence before the Court), and the approach will minimise the potential for factual disputes (which the Further Issues trial has been designed to avoid), thereby limiting the opportunity for the Judge to make findings to resolve any factual dispute (which could be adverse and binding on Post Office at later stages of the litigation).

This approach will also help keep the Court focused on determining the legal principles surrounding recoverability of losses rather than the history of the four lead cases. Findings about the scope of those losses (particularly loss of earnings and litigation funding) are important to clarifying Post Office's potential exposure and for creating common ground on settlement.

The Defences are currently being drafted in line with this approach, which the Subcommittee is asked to note, ahead of the 25 November 2019 filing deadline.

## Next Steps

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<sup>2</sup> For example, although we will not challenge whether Post Office unlawfully terminated a Claimant's postmaster contract (which will be assumed without any admission as to its actual truth), we will assert as additional assumed facts that the contract would have come to an end anyway, so the Claimant has suffered less loss of earnings than s/he is claiming. The Court will then be asked to determine whether a claim on these assumed is recoverable in principle.



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An overview of the main court and settlement-related activity in the Group Litigation through to October 2020 is set out in the “Group Litigation Timetable” at **Appendix 1**.

Between now and early December 2019 we are preparing to:

- receive the Horizon judgment (now imminent);
- attend the Court of Appeal on 12 November 2019 for the hearing on permission to appeal the Common Issues Judgment;
- file Defences to the Further Issues trial IPOC by 25 November 2019; and
- attend mediation on 27-28 November 2019;
- complete the individual claimant case reviews and draw up a criteria for selecting test cases for later trials.

A timeline of the key milestones to early December 2019 is set out at **Appendix 2**.

Operational responses to the Common Issues Judgment and Contingency Planning for the Horizon Judgment are being reported separately.

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# Appendices

## 1. Group Litigation Timetable

	<b>Oct 2019</b>	<b>Nov 2019</b>	<b>Dec 2019</b>	<b>Jan 2020</b>	<b>Feb 2020</b>	<b>March 2020</b>	<b>April 2020</b>	<b>May 2020</b>	<b>June 2020</b>	<b>July 2020</b>	<b>Aug 2020</b>	<b>Sept 2020</b>	<b>Oct 2020</b>
<b>Common Issues Appeal</b>		Oral permission hearing (12 Nov)	File additional documents with Court as required for appeal if permission is granted.							Likely window for Court to hear appeal if permission is granted.  Note: Court vacation August & September so unlikely appeal will be heard in these months.			
<b>Horizon Issues Trial</b>		Likely window for Horizon Issues Judgment		Hearing on costs of Horizon Issues trial									
<b>Further Issues Trial</b>	Costs Budgets (2 Oct) Discussion Reports (16 Oct) Costs Management Conference (23 Oct) Particulars of Claim (25 Oct)	CMC (7 Nov) Defences (25 Nov)	Statement of Assumed Facts (2 Dec) CMC (4 Dec) Replies (9 Dec)	PreTrial Review (23 Jan)		Further Issues Trial (2-20 Mar)		Likely window for Further Issues Judgment		Hearing on costs of Further Issues Trial			
<b>Trial 4</b>		Agree test case selection criteria (27 Nov)								Likely window for Trial 4			
<b>Settlement</b>	Without Prejudice Lawyers meeting (10 Oct)	Mediation (27-28 Nov)		Window for possible second mediation									

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<u>No.</u>	<u>Date</u>	<u>Milestone</u>
1.	Imminent	Horizon: judgment expected to be handed down on or after this date
2.	12 November	Common Issues: Oral hearing of Permission to Appeal application
3.	13 November	Post Office Board GLO Sub-Committee on or after this date
4.	18 November	Further Issues Trial: Internal deadline for legal team to draft Defences and provide to Post Office for sign off.
5.	25 November	Further Issues Trial: Deadline for Post Office to serve individual Defences
6.	26 November	Post Office Board Meeting
7.	27 November	Parties to serve and file their proposed Selection Criteria for Test Claimants
8.	27 – 28 November	Mediation. UKGI/BEIS authority to be obtained if required.
9.	3 December	Parties to set out assumed facts and issues to be decided at Further Issues Trial
10.	4 December	Case Management: Case Management Conference to resolve any disputes about issues to be dealt with at FIT